In the
Supreme Court of the United States

OCTOBER TERM 1961

No. 827

LIBRADO SEDA ALVAREZ,
PETITIONER,

v.

THE PEOPLE OF PUERTO RICO,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, Librado Seda Alvarez, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on March 1, 1962.

Opinions Below

The opinion of the Court of Appeals (App. A, infra, P. 22) is not as yet reported. The opinion of the Supreme Court of Puerto Rico is not as yet officially reported in the English language, but a translated opinion appears at Pages 31-44 of the Record-Appendix filed in the Court of Appeals

and filed herewith in one certified and nine additional copies, pursuant to Rule 21 of the Rules of this Court.

Jurisdiction

The judgment of the Supreme Court of Puerto Rico was affirmed by a Per Curiam opinion of the Court of Appeals. The judgment of the Court of Appeals was entered on March 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a police officer acting as an undercover agent and wearing civilian clothes may lawfully enter the home of a citizen without a warrant in order to gather evidence for use at a subsequent criminal trial of that citizen under the Search and Seizure and Due Process provisions of the Federal Constitution.

2. Whether the arrest of a citizen on a charge of a misdemeanor can be delayed for a period of more than six (6) full months under principles of due process of law when the government at all times during the six months has knowledge of, and evidence of, the alleged commission of the offense and the identity of the alleged misdemeant from a police officer acting as an undercover agent, and the alleged misdemeant is at all times available for service of process.

3. Whether a predetermined design by a police officer acting as an undercover agent, not to make arrests when crimes are committed in his presence in order to gain evidence against the greatest number of persons possible, excuses production of primary evidence of the commission of an offense so that it may be examined by a magistrate.

4. Whether the interpretation of 34 L.P.R.A. §3 by the Supreme Court of Puerto Rico permitting a different prosecutor to file an information from the one who took the sworn statements from the witnesses to the offense contravenes the due process provisions of the Federal Constitution.

Statutes Involved

The statutory provisions involved are the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; the Puerto Rican Bolita Act—Act 220 of May 5, 1948, Sec. 4 (33 L.P.R.A. §1250); and the Code of Criminal Procedure, Sec. 3 (34 L.P.R.A. §3). All applicable statutes or provisions thereof are set forth in Appendix C, infra, pp. 24-26.

Statement

The petitioner was convicted on multiple informations charging him with violation of §4 of the Bolita Act of Puerto Rico (number pool gambling).

1. In this case after the informations were filed, petitioner filed motions for particulars (R. 6) which were allowed (R. 7). In response thereto, the Government filed the affidavit of Police Officer Hector M. Calero, which is set forth in full at pages 2-3 of the Record-Appendix. The portion thereof material to this question is as follows:

> "That I have been entrusted a confidential mission. That I dress as a civilian at all times so as to be able to comingle with the persons in the place where I am on duty and the instructions I have received are not to make an arrest when the law is violated in my presence, but rather to obtain evidence against the

greatest number of persons possible and then to submit same to the consideration of an examining magistrate."

A motion to suppress the evidence of Officer Calero was filed based on violation of constitutional rights (R. 8) and denied after hearing (R. 9). The case was then submitted to the trial judge [1] as a case stated. The *only* evidence offered to support the government's case was Calero's affidavit (R. 14), together with a stipulation from government counsel that no search warrant was obtained before entry was gained into petitioner's home.

2. The Supreme Court of Puerto Rico had before it all the affidavits of Officer Calero filed with each of the nineteen informations filed against the petitioner. That court noted that "except for the date of the violation, the pertinent part of the sworn statement of policeman Calero" was the same as each other, and that the date of the first offense was May 9, 1959 (R.A. 33). The affidavit in this Record pertains to the date of the last offense, September 12, 1959. The date on which the informations were filed was December 18, 1959.

The section of the Bolita Act in question states that an offender " . . . shall be immediately arrested. . .". (See Appendix C, p. 25).

3. Policeman Calero stated in his affidavit that he bought ticket No. 935 from the petitioner (R.A. 2); that the petitioner entered the number on a piece of wrapping paper in a manner "used in the illegal game of *Bolita*" (R. 3); and that the petitioner did not give him the ticket number "for which reason [he] cannot present physical evidence in this case".

4. In this case, policeman Calero gave his sworn state-

[1] Under the Bolita Act, 33 L.P.R.A. §1250, there is no right to a trial by jury for a misdemeanor. (See Appendix C, pp. 25-26).

ment to District Attorney Luis Angel Limeres (R. 3); the information was signed by Agustin Mángual Hernandez (R. 1) whose oath was taken by a Mr. Gonzales, Clerk of the Court (R. 2).

The pertinent provision of the Code of Criminal Procedure of Puerto Rico, 34 L.P.R.A. 34 (See Appendix C, p. 26) provides in essence that the district attorney who files the information shall have himself either sworn the witness or heard their testimony before an examing magistrate and that he solemnly believes there is just cause for filing the information.

The petitioner in this case was found guilty on all charges (R. 10) and was sentenced to concurrent sentences of six months on each complaint.

Argument

1. A policeman, one Hector M. Calero, entered the private home of the petitioner in Cabo Rojo, Puerto Rico, while on official police business in order to gather evidence against the petitioner of violation of the Bolita laws in order to prosecute the petitioner at some later date which in fact did happen. As stated above, he was found guilty and sentenced to jail. This policeman was in civilian clothes with his true identity hidden (being on a confidential mission —R. 3) and had instructions not to make any arrests for offenses committed in his presence so that his purpose and identity could remain secret. Thus, he could "obtain evidence against the greatest number of persons possible" (R. 3) before having to give up his spying and going before an examining magistrate.

Clearly, Mr. Calero was neither "an undercover agent" nor a "stool pigeon" as those phrases were used in *On Lee v. United States*, 343 U.S. 747 at 749. Mr. Calero was actually a police officer (even though he may also have been

serving in the dual capacity of "an undercover agent"). The question resolves itself to whether or not it is a trespass for a police officer to enter a private home with his true identity kept a secret for the purpose of obtaining evidence to be used at a subsequent criminal trial against the citizen who owns the home. Petitioner submits that this is in fact a trespass and is within the interdiction of the Fourth Amendment regardless of whether the officer gained admission by affirmative fraud or by passive non-disclosure.

THE FACTS OF THIS CASE ARE SUCH AS TO CALL FOR THIS COURT TO EITHER OVERRULE THE *On Lee* CASE OR TO LIMIT IT TO ITS FACTS.

Further, the time is now ripe to carry the case of *Frank* v. *Maryland*, 359 U.S. 360 to a conclusion by answering the question not raised by the facts and left open in the majority opinion, i.e., what would the result have been had the inspector been there to gather evidence for a criminal prosecution rather than for the health of the community.

The search conducted in this case is far more insidious by reason of its nature than those conducted and disapproved of in *Johnson* v. *United States*, 333 U.S. 10, where the officers identified themselves and were admitted; and in *Nueslein* v. *District of Columbia*, 115 F.2d 690, C.A.D.C. (1940), where officers investigating an accident entered the defendant's home and obtained a confession from him. By way of analogy, this case can be more closely compared to *Gouled* v. *United States*, 255 U.S. 298, where admission to defendant's office was gained by stealth (although admittedly in the absence of the defendant); *Fraternal Order of Eagles* v. *United States*, 57 F.2d 93 (1932), where entry was gained without a warrant by the officers representing themselves as members of another Lodge of Eagles; and *United States* v. *Reckis*, 119 F. Supp. 687, D.C.D. Mass.

(1954) where agents gained entrance without a warrant by representing that they were sent by the "boss" to fix the still.

Certainly, the fact that Officer Calero turned up evidence of Bolita gambling after he gained entrance to petitioner's home does not make the search lawful. See *United States* v. *Di Re*, 332 U.S. 581, 595; *Henry* v. *United States*, 361 U.S. 98, where this Court said at P. 104:

> "To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."

The Supreme Court of Puerto Rico rejected the petitioner's contentions about search and seizure essentially on two grounds: 1) that there was no search, and 2) that there was a waiver by way of implied invitation for the officer to enter (R. 38-40). Of course, the Court of Appeals, by rejecting the appeal in a Per Curiam opinion, does not make its position on the question known. The Puerto Rican Supreme Court cites *On Lee* but fails to distinguish between an "undercover agent" or "stool pigeon" entering a laundry on the one hand and a police officer entering a private home on the other. Petitioner submits that not only is there a difference, but an important one. One of the very foundation stones of this basic freedom from uncontrolled invasion of his privacy is that a citizen need not fear that someone seeking entrance to his home is a disguised police officer performing official duty. As stated by Mr. Justice Douglas in his dissent in *Frank* v. *Maryland*, 359 U.S. 360 at 381-382: "It does not make the home a place of refuge from the law. It only requires the sanction of

the judiciary rather than the executive before that privacy may be invaded."

On the issue of whether the search must involve some thing tangible as distinguished from intangible, Mr. Justice Stewart, speaking for this Court without dissent, said in *Silverman* v. *United States*, 365 U.S. 505 at 511-512:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. . . . This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, *there secretly observe or listen*, and relate at the man's subsequent criminal trial what was seen or heard." (Emphasis added)

In *Nueslein* v. *District of Columbia*, 115 F.2d 690, the Court said at P. 692:

> "The crucial thing 'found' in this 'search' was a declaration of fact by the defendant which has become decidedly incriminating."[2]

See also *Fraternal Order of Eagles, No. 778* v. *United States*, supra, (57 F.2d 93) at P. 94; and *McGuinness* v. *United States*, 227 F.2d 598, where Judge Hartigan speaking for this same First Circuit Court said at P. 603:

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[2] On pp. 19-20 of its brief in the *On Lee* case, the Government argued that the confession in *Nueslein* was the illegal fruit of an unlawful search and that the search by the entry of a private dwelling without a warrant is what was held to be illegal and not the "listening to the accused as he confessed to the crime". Petitioner does not entirely agree with this but it is immaterial to this case where the policeman both entered the private dwelling without a warrant and then observed gambling activity.

> "We find no basis in the cases or in logic for distinguishing between the introduction into evidence of physical objects illegally taken and the introduction of testimony concerning objects illegally observed. We are aware of no case which makes this distinction."

In *On Lee v. United States*, 343 U.S. at 753-754, Mr. Justice Jackson said:

> "... Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if Agent Lee had been eavesdropping outside an open window."

The question not raised there and therefore left unanswered, and which the petitioner now asks this Court to answer, is: What would be the situation if Agent Lee had gone inside with Chin Poy and heard the conversation, or to carry it one step further, and make it almost like the case at bar, what would have been the result had Agent Lee gone in himself and acted as the undercover agent?

Petitioner recognizes and realizes that the government may use artifice and stratagem in obtaining evidence and such conduct alone would not entitle the petitioner to a suppression of the evidence. However, carrying artifice out to the point of physically invading a private dwelling is "dirty business" which ought not to be allowed. It is fraught with every danger and vice that could ever be conceived and against which the Constitution was created to protect. As Mr. Justice Frankfurter said in his dissent in *On Lee* (343 U.S. at 758):

> "The law of this Court ought not to be open to the just charge of having been dictated by the 'odious doctrine,' as Mr. Justice Brandeis called it, that the end justifies the reprehensible means."

No appeal to "necessity" can be made in this case "because of their [Bolita offenses] essential clandestine characteristic would remain unpunished if said method were not used. . . ." (R. 41) This type of argument was answered precisely in *United States* v. *Di Re*, 332 U.S. 581, 595:

> "We meet in this case, as in many, *the appeal to necessity*. It is said that if such searches and arrests cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, *which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.*" (Emphasis added)

Mr. Justice Jackson said quite aptly in his dissent in *McDonald* v. *United States*, 335 U.S. 451, 459-460, in speaking of number pools:

> "It is to me a shocking proposition that private homes . . . may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. . . . *While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures.* When an officer undertakes to act as his own magistrate, he

ought to be in a position to justify it by pointing to some real, immediate and serious consequences if he postponed action to get a warrant." (Emphasis added)

We could come to the shocking proposition that if a policeman can lawfully enter a private dwelling for the purpose of securing "information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property", *Frank v. Maryland*, 359 U.S. 360, 365, without a warrant because he is acting as an undercover agent, then police will not bother to get warrants and will not identify themselves as police officers. Cf. *Johnson v. United States*, supra, (333 U.S. 10). See in this respect, *Wrightson v. United States*, (C.A.-D.C. (1955), 222 F.2d 556, where Judge Prettyman said at P. 559:

> "To hold that a search warrant cannot issue except upon probable cause shown under oath, but that a search can be made without any factual demonstration of probable cause so long as it is made without a search warrant, would be a deliberate circumvention of the constitutional prohibition. . . ."

The rationale of the *On Lee* and *Frank* cases militate against this type of invasion of privacy in a dwelling which is guaranteed by our Constitution.

We next come to the question of waiver based on what the Supreme Court of Puerto Rico called "an implied in-

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[1] The only reason in this case for not getting a warrant is so the police could get evidence on the most number of people. This is certainly no reason under the civilized standards of English and American law. This concept is not just "dirty-business"; it is vulgar and abhorrent.

vitation" (R. 40). The first consideration here is that courts indulge in every reasonable presumption against waiver of constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464. If the Government seeks to be exempt from acts prescribed by the Fourth Amendment, then the burden of proof is on the Government to show it is entitled to an exemption. See *United States v. Jeffers*, 342 U.S. 48, 51. To show a waiver, the burden is on the government to show by clear and convincing evidence that the waiver was unequivocal and specific and freely and intelligently given. See *United States v. Martin*, D.C.S.D.N.Y. (1959), 176 F. Supp. 262, 266-267; *Nardone v. District of Columbia*, 115 F.2d 690 at 694.

Going from these governing principles to the facts of this case, the government of Puerto Rico admitted or stipulated that a police officer, dressed as a civilian and with his identity kept secret, entered the home of the petitioner without a search warrant for the purpose of gathering evidence against him concerning criminal activities. In turn, this evidence was to be submitted to an examining magistrate (R. 3). Up to here, we have the very type of conduct which this Court held, in effect unanimously in the *Frank* case, was forbidden by the Fourth Amendment, especially as it relates to the Fifth Amendment by giving evidence against oneself.

The petitioner filed a timely motion for suppression of the evidence which the police officer obtained in the dwelling, alleging that "defendant's residence was illegally and wrongfully invaded and searched by an officer of the Commonwealth of Puerto Rico . . . without said officer having presented any warrant issued therefor by competent authority, thereby violating the constitutional rights of the defendant to the protection of his person, residence and belongings against unreasonable and wrongful searches and seizures and his right to the privacy of his home" (R. 8).

At that point, the burden of proof was on the Commonwealth to show by "clear and convincing evidence" that the petitioner had clearly, intentionally, and unequivocally waived his constitutional right. The petitioner submitted that there was no evidence of such a waiver, as indeed there could not have been.

The Supreme Court of Puerto Rico, in its opinion, based its finding of waiver on [petitioner's] action in permitting the policeman to enter" (R. 39) and "because the policeman was there on seventeen occasions to bet on the same number, and that he did so because the defendant consented" (R. 40). During oral argument before the Court of Appeals, the Justices there took the same position, i.e., that the fact that the police officer was there on 17 occasions shows that he must have been invited inside with the consent of the petitioner. The error in the position taken by each of the courts below is that this conclusion of implied invitation *presupposes the lawfulness of the first visit.* In *Go-Bart*, Mr. Justice Jackson, speaking for the court, discussed the doctrine of trespass ab initio (281 U.S. at 356) and said it has no application to criminal law.

Therefore, just as a lawful entry is not made unlawful by subsequent conduct as a criminal case, the converse is also true: an unlawful entry cannot be made lawful by any subsequent conduct.[1] There is utterly no evidence in this case to show the initial entry was lawful. To the contrary, the only reason that this trespassing police officer was al-

[1] In its Brief before the Court of Appeals, the Commonwealth argued:

> "It is more consonant with logic to suppose that, if a person visits another's residence on seventeen occasions, and once there is, the dweller engaged in certain illegal activities with the visitor, the latter does it with the full and total consent and acquiescence of the former."

This is the same view as was taken by both courts below. Actually, it is irrelevant whether it was 17 or 70 visits. This policeman was a trespasser and remained on

lowed or able to go into that private home on so many occasions (and it would be no different if the figure were 117 instead of 177) is just because of the very fact THAT HE DID NOT GET A SEARCH WARRANT. When one stops to realize that had this policeman obtained a warrant as required by law, he would have served it, made his return on it, and filed it back in court. Then, of course, THERE NEVER COULD HAVE BEEN MORE THAN ONE VISIT.[5] In other words, what both courts below have condoned is to allow a police officer to go further without a warrant than he could have done with a warrant. See *Wrightson v. United States*, C.A.D.C. (1955) 222 F.2d 556. Therein lies the real "dirty business" which the Supreme Court of Puerto Rico very much mistakenly refers to as "entrapment" (R. 41). This is far worse than entrapment; this is setting up a trap in order to cause a man to incriminate himself within his own home —conduct prohibited by the Fourth *AND* the Fifth Amendments. Entrapment is nowhere near as "dirty" as this conduct. The court below could not have been further off base than it was when it discussed this conduct under the topic of "entrapment". In other words, this was not a case of entrapment at all but rather is an application of the Fifth Amendment as it applies to the Fourth Amendment, which was discussed by Mr. Justice Frankfurter speaking for the Court in *Frank v. Maryland*, supra.

The petitioner respectfully submits that there was an unlawful search conducted in this case and no issue of waiver of rights is shown to exist. The importance of this case, as it relates to the *On Lee* and *Frank* cases, fairly requires the granting of this writ. The petitioner, as a

[5] It is for this very same reason that the two occasions mentioned by the court below (R. 33, n. 2) also come within the exclusionary rule. Without a warrant, the cycle could have gone on *ad infinitum*. This was clearly the poisoned fruit of the unlawful search. It is too basic to require argument here that the by-product of an unlawful search by the police is equally unlawful and will therefore also be suppressed.

citizen of Puerto Rico, enjoys all the protections of the Due Process and Search and Seizure provisions of the Fourth and Fifth Amendments. See *Mora* v. *Mejias*, 206 F.2d 377, 382; *Fournier* v. *People of Puerto Rico*, 281 F.2d 888, 891; *Colon-Rosich* v. *People of Puerto Rico*, 256 F.2d 393, 397; *Mapp* v. *State of Ohio*, 367 U.S. 643 (1961).

2. Violation of the section of the Bolita law that the petitioner is charged with is a misdemeanor for a first offense (R. 37-38). The relevant section of the Act is set out in full in Appendix C, infra, p. 25. It should be noted here that the date of the first offense was May 9, 1959, and the date of the last offense was September 12, 1959 (R. 33, n. 2). The date of the filing of the information was December 18, 1959 (R. 2, 37). In other words, *more than seven months* elapsed from the date of the last violation charged and the the filing of the information, and more than three months elapsed from the date of the last violation charged and the filing of the information.

During all that time, the government had both knowledge of the identity of the alleged offender as well as evidence of the commission of the crime from the testimony of Officer Calero. The petitioner was at all times available to be served with process.[5] Nevertheless, the government, for reasons of its own, failed to issue process for almost seven months after the commission of the first offense charged. Here again, it must be noted that had the policeman obtained a search warrant the first time he went into petitioner's home, this situation could not have arisen in the manner in which it did.

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[5] This situation is to be distinguished from one involving the statute of limitations, which involves a cut-off date after which the government cannot prosecute if; within the time allowed, it has no knowledge of the identity of the offender or has no evidence with which to prosecute or is unable to find the offender (with certain exceptions not relevant here). The question presented here can be compared by way of analogy to laches or estoppel as related to the right to a speedy trial.

It is submitted that in relatively minor type offenses which are repetitive in nature and have no particular significance attached to them by way of memory stimulation, such as speeding on an expressway used daily or taking bets on a numbers lottery, such a very long delay in issuing process as is here presented under the facts of this case is in and of itself prejudicial. The petitioner filed a timely motion to dismiss based on alleged violation of his constitutional rights in this respect (R. 3-4).

The Supreme Court of Puerto Rico, in its opinion, makes much of the fact that the petitioner rested his case on the constitutional questions and did not present any evidence on his behalf (as indeed he is not required to do). This is not so hard to understand when an experienced judge or trial lawyer takes into consideration that the petitioner was denied a trial by jury under the statute (R. 38 n. 7), and that sentences can run consecutively as well as concurrently.

Assuming that a daily user of an expressway in and out of a large city admits that he frequently exceeds the speed limit or that a Bolita fixer regularly takes number bets, how can such a person come into court and honestly plead to a charge that he exceeded the speed limit on a date more than seven months ago or that he sold a certain number on a particular date more than seven months ago. Certainly, there would be no chance of establishing an alibi for that date unless, by a pure miracle or stroke of luck, some event occurred which was recorded in some records somewhere that would establish an alibi. As to the past seven days, a person with a good memory might perhaps be able to account for all of his time and locate where he was on each day at any particular time, but as to seven *months* ago, this is all but impossible.

So, at a trial in a case like this where it is held without a jury, a defendant is faced with the proposition of coming into Court and saying that the affidavit of the policeman

is false, where the police officer will testify that he kept a meticulously detailed daily log of his "undercover" activities. The defendant then has not only no chance of an acquittal but runs a very grave risk of a severe sentence. This need not be spelled out any further. If this same Puerto Rican citizen had been arrested for a misdemeanor involving a trial in the Federal District Court in San Juan, he would be entitled a trial by jury on any criminal charge. It is absolutely monstrous that a delay like this can be sanctioned where there is no right to a trial by jury as any mainland citizen of the United States would get.

Moreover, the Bolita statute states unequivocally that an offender "shall be immediately arrested and the case shall be brought without delay before the prosecuting attorney having jurisdiction on the matter, who shall file the proper information" (App. C, p. 25). The Supreme Court of Puerto Rico brushed off the word "immediate" as having "rather a grammatical than a legal force" (R. 36). In other words, the court held that when the legislature used the word "immediate", it did not mean "immediate". Admittedly, "immediate" does not mean the exact second of the occurrence. *United States* v. *Bell*, D.C.S.D. Cal. (1943) 48 F. Supp. 986, 994, but certainly, it does not mean seven months either. Ordinarily, penal statutes are to be construed strictly in favor of an accused: "Where there is no ambiguity in the words, there is no room for construction." *Yates* v. *United States*, (1956) 354 U.S. 298, 305; *Arroyo* v. *United States*, (1958) 359 U.S. 419, 424. See also 2 Sutherland on Statutory Construction, 3rd Ed., 4705.

In this case, the only reason for the long delay again was to get the most possible people inside the dragnet. One wonders whether the investigation was conducted to stamp out Bolita gambling or to send as many people as possible to jail or both. To do this, the government wanted to keep the identity of the police officer as such a secret so he could

continue his undercover work. They can do this if they wish, but the price may be to let "the defendant go free", *Jencks* v. *United States*, (1956), 353 U.S. 657, 671. The right of a *potential* defendant to a speedy trial is discussed generally in 5 Stan. L. Rev. 95, Justice Overdue, Speedy Trial for the Potential Defendant. In *Harris* v. *Municipal Court*, 209 Cal. 55 (1930), the Court said at P. 60 that this right (of a potential defendant) is embodied in the Sixth Amendment. The Court held that prejudice will be presumed from the violation of the constitutional right unless the government shows good cause for the delay.

Petitioner respectfully submits that this issue of the right of a potential defendant to a speedy trial is important enough to require issuance of the writ sought. Petitioner knows of no case in this Court in which this question has been decided. There would seem to be a requirement of due process that the statute be strictly construed, especially where there is no right to a trial by jury. Procedural safeguards are the foundation stones of a free society.

3. Officer Calero stated in his affidavit (R. 2-3) that he could not present physical evidence in court because he was not given a ticket. He testified he observed the defendant enter numbers on a piece of wrapping paper, "all of said numbers being used in the illegal game of Bolita" (R. 3). The Supreme Court of Puerto Rico stated that the "primary" or "material" evidence did not have to be produced because the defendant did not give him a ticket, because the defendant could not have been compelled to deliver any incriminatory evidence in his possession, and because the defendant chose not to present any evidence but rather to rely on the questions of law presented (R. 41-44). Before the Court of Appeals, the Government argued that, in any event, testimony by the officer of what he saw constitutes primary evidence. See 2 Wharton's Criminal Evidence, p. 481 §594 and p. 501 §607.

Neither position, however, is precisely the issue sought to be raised by the petitioner. The issue sought to be raised is one of procedural due process. Again, reverting to Questions 1 and 2, if the police officer had obtained a search warrant and "immediately" arrested the petitioner upon seeing an offense committed, the piece of wrapping paper would have been seized and therefore been available for judicial inspection. Mr. Calero said he saw petitioner write down three-digit numbers followed by a dash and "other numbers" to the right (R. 3). Without seeming to be trite, the numbers "760-15" or "800-14" describe automobile tire sizes and presumably, a person writing a list of tire sizes on a piece of wrapping paper would not be prosecuted as a numbers bookie. To paraphrase the words of this Court in a search warrant case involving obscene literature, the failure to obtain the wrapping paper for judicial inspection[7] leaves the convictions to rest on "the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be [used for Bolita gambling]". *Marcus v. Search Warrant*, 367 U.S. 717, 732. Too much discretion in the police lacks sufficient safeguards "to prevent erosion of the constitutional guaranties". 367 U.S. at 733.

In other words, petitioner here asserts that adherence to the requirements of procedural due process would have produced the "hard" evidence for the court to scrutinize.

4. The purpose of proceeding by information is to avoid the necessity of convening grand juries to hear and indict

---

[7] Despite intimations by the court below that petitioner could have produced the wrapping paper himself, it is not a shocking thought that in the several months that elapsed before he was made aware of the fact that a policeman had been watching him in his own home, the piece of wrapping paper could have been destroyed. There is nothing spectacular about a piece of wrapping paper. This again points up the need for a warrant and an immediate arrest.

petty crimes. The informations must be sworn to as set out in 34 L.P.R.A. 127 as follows:

> "I hereby certify that the above information is filed based upon the sworn testimony of *witnesses examined before me*, and *I* do solemnly *believe* that there is just cause for the filing of this information." (Emphasis added)

In this case, the witness was examined by one Limeres and the information was sworn to by one Mangual (R. 2). The court below said that "the Legislature apparently required that the information be supported by sworn statements in order to offer a greater guarantee with respect to the accusatory system" (R. 35). However, the court felt that the phrase, "the prosecuting attorney" in 3 of Title 34 (App. C, p. 26) refers to the generic concept of "representative of the state" (R. 35). Certainly, a defendant would be deprived of due process if an indictment showed on its face that the evidence was heard by one grand jury and that the indictments were voted (without re-presentation of the evidence) by a subsequent grand jury. The information procedure as a substitute for the grand jury procedure, should be clothed with as many safeguards as the grand jury. How can one prosecutor swear under oath that another prosecutor who examined the witnesses had such solemn belief, or at least, how can we be sure of it? It is equally inferable that the examining prosecutor did not have the requisite belief and that is why he did not sign the affidavits.

The protection afforded citizens by these statutes (against arbitrary prosecution) is lost under the view adopted by the Supreme Court of Puerto Rico as to the requirements of the statutes. This violates fundamental principles of due process and is therefore patently erroneous.

Petitioner is fully aware of the principles governing the issuance of a writ of certiorari. Perhaps Questions 3 and 4, either alone or even taken together, would not warrant issuance of the writ. However, taken against the background of the entire case, the writ should issue on all the questions on the issue of due process. In *Betts v. Brady*, 316 U.S. 455, this Court said at P. 462:

> "The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. *Asserted denial is to be tested by an appraisal of the totality of facts in a given case.* That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. . . ." (Emphasis added)

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5900.

LIBRADO SEDA ALVAREZ,
DEFENDANT; APPELLANT,

v.

THE PEOPLE OF PUERTO RICO,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO

Before WOODBURY, *Chief Judge*, and ALDRICH and GANEY,* *Circuit Judges*.

OPINION OF THE COURT
March 1, 1962.

PER CURIAM. This is an appeal from a judgment of the Supreme Court of Puerto Rico affirming a judgment of sentence entered by the Superior Court of Puerto Rico, Mayaguez Part. It presents no substantial question of constitutional right nor serious question of interpretation of local law.

Judgment will be entered affirming the judgment of the Supreme Court of Puerto Rico.

*By Special Assignment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5900.

LIBRADO SEDA ALVAREZ,
DEFENDANT, APPELLANT,

v.

THE PEOPLE OF PUERTO RICO,
APPELLEE.

JUDGMENT
March 1, 1962

This cause came on to be heard on appeal from the Supreme Court of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

[cc. Messrs. Louison and Segarra Olivero]

APPENDIX C

CONSTITUTION OF THE UNITED STATES:

Fourth Amendment:—

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:—

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:—

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining wit-

nesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment:—

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Act 220 of May 5, 1948, Sec. 4 (33 L.P.R.A. 1250):—

Any person caught carrying or transporting or who has in his possession for any reason any papeleta, billete, ticket, notebook, list of numbers or letters, slips; or implements which can be used for the unlawful games of bolita, bolipool, combinations connected with the pools or bancas of the race tracks of Puerto Rico, and clandestine lotteries, and any person who possesses, sells, or in any way transports these or any other similar ones which may be utilized or used in said unlawful games or connected with the practice thereof, shall be guilty of a public offense and shall be immediately arrested and the case shall be brought without delay before the prosecuting attorney having jurisdiction on the matter, who shall file the proper information. Such person shall, upon conviction, be punished by imprisonment in jail for a term of not less than six (6) months or more than two (2) years; and for the second and subsequent violation, shall be punished by imprisonment in the Penitentiary for not less than one (1) year nor more than ten (10) years. Pro-

vided, That all trials for violations of the provisions of sections 1247-1257 of this title shall be heard in the Superior Court by the court without a jury, exclusively, and the judges of the Superior Court of Puerto Rico are hereby directed to give preference to the hearing of all cases involving a violation of any of the provisions of section 1247-1257 of this title.

Code of Criminal Procedure, Sec. 3 (34 L.P.R.A., 3):

Every offense of which the Superior Court has original jurisdiction must be prosecuted by information filed by the prosecuting attorney, in open court, verified by his affidavit, which shall be sufficient if it states that the information is based upon the testimony of witnesses, sworn before him, or upon the testimony of witnesses taken before an examining magistrate, and that he solemnly believes that there is just cause for filing the information.

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In the

Supreme Court of the United States

No 827

LIBRADO SEDA ALVAREZ,
PETITIONER,

v.

THE PEOPLE OF PUERTO RICO,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

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In the
Supreme Court of the United States

No 827

LIBRADO SEDA ALVAREZ,
PETITIONER,

v.

THE PEOPLE OF PUERTO RICO,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of Puerto Rico is not yet officially reported in the English language, but a translated opinion appears at pages 31-34 of Petitioner's Record Appendix in the court below—hereinafter referred to as R.A. The Per Curiam opinion of the United States Court of Appeals for the First Circuit appear in App. A of Petition.

Counter Statements of Question

I.

Whether the Supreme Court erred in holding that a police officer acting as an undercover agent may lawfully

enter the home of a citizen without a warrant in order to gather evidence against a citizen and as a part of a large scale investigation of clandestine activities—for use at a subsequent trial—if the citizen consent to such an entry by inviting the undercover agent to visit defendant's home wherein the latter engaged in the sale of Bolita numbers to the former.

II.

Whether the interpretation accorded to section 4 of Act No. 220 of 1948, and to section 448 of the Code of Criminal Procedure of Puerto Rico, by the Court below, with reference to immediate arrest, is patently erroneous or inescapably wrong and violative of the Constitutional provisions granting speedy trials in criminal cases.

III.

Whether the Supreme Court of Puerto Rico was patently erroneous or inescapably wrong in holding that the evidence offered by the prosecutions during the trial of the instant case, and admitted by the court, was primary evidence, and that even if it were to be regarded as secondary evidence, if it was admissible under the specific circumstances of the present case.

IV.

Whether the interpretation of Title 34 L.P.R.A., section 3, by the Supreme Court of Puerto Rico with reference to the verification of informations by sworn statements is patently erroneous or inescapably wrong and contravenes the due process provisions of the United States and Puerto Rican Constitutions; and whether an information

charging a misdemeanor can be set aside on the grounds that it is not duly verified.

Statement of the Case

Petitioner's Statement of the case is substantially correct. It can be complemented by the statement of facts set forth in the opinion of the Supreme Court of Puerto Rico, at pages 31-34 of the Record Appendix. We submit that there is no controversy as to the material facts of this case, since all of them are set forth exclusively in agent Hector M. Calero's sworn statements (R.A. Page 2 and 3).

Thus, we do not accept any conclusion or legal implications made by appellant in his statement of facts.

First Question Presented

From the sworn statement of police officer Hector M. Calero sole witness in this case it is shown, in its pertinent part regarding the question under discussion that:

> "That I know of my own personal knowledge, because I have seen it and have gambled on several occasions, that Librado Seda, known as Libra, is engaged in selling, collecting, carrying on his person, manipulating and keeping material related to the illegal game of Bolita, in violation of Act No. 220 of May 15, 1948.
>
> That on September 12, 1959, at about 2:30 p.m., and at his residence, No. 26 Angel Franco Street, Cabo Rojo, Puerto Rico, I bought from Mr. Seda ticket No. 935 for the amount of $1.00 for the illegal game of Bolita. That Mr. Seda entered said number in a piece of wrapping paper where he had entered other three-digit numbers followed by a dash and other numbers

to the right, all of said numbers being used in the illegal game of Bolita. That Mr. Seda did not give me the ticket number for which reason I cannot present physical evidence in this case.

That I have been entrusted a confidential mission. That I dress as a civilian at all times so as to be able to comingle with the persons in the place where I am on duty and the instructions that I have received are not to make an arrest when the law is violated in my presence but rather to obtain evidence against the greatest number of persons possible and then to submit same to the consideration of an examining magistrate."

It is admitted that said agent Calero visited petitioner's residence in some seventeen occasions and wagered one dollar on the same number 935. It is also admitted that agent Calero did not present or obtain any search warrant to enter in defendant's home.[1]

Petitioner concedes that a search and seizure is lawful if it is authorized by invitation, express or implied, of the defendant. We submit that consent to a search may consti-

[1] Petitioner filed before the trial court a motion to suppress the evidence of officer Calero based on the grounds "that said agent had invaded defendants residence, without a search warrant, and that therefore his sworn statement as to what he saw and observed there was inadmissible and its suppression should have been ordered upon being timely requested." The motion for suppression of evidence was dismissed in all the cases.

On appeal, the Supreme Court ruled that the right against illegal searches could not be invoked under the only facts presented to the trial court, that is, those appearing in the sworn statement of the undercover agent. It also decided that in case that the right against search and seizure could be invoked such right may be waived, and that the waiver is implied from defendants action in permitting the policeman to enter, or when it is established that there was an implied invitation on his part. See authorities cited by the Supreme Court of Puerto Rico. (R A page 39)

tute a waiver of the rights secured by the Fourth Amendment.[2]

Petitioner's contention is lacking of merit. The sole evidence before the trial court (Agent Calero testimony) showed that Calero visited petitioner's residence on only seventeen occasions, in all of which the dwelling petitioner engaged in illegal activities by selling bolita tickets to said agent; but the mere presence of agent Calero in petitioner's residence can not have the effect to establish, as a matter of fact, that said agent illegally entered or invaded petitioner's residence. It is more consonant with logic to suppose that, if a person visits another's residence on seventeen occasions, and once therein, the former engages in certain illegal activities with the visitor, the latter does it with full and total consent and acquiescence of the former.

The picture hereinbefore described is that of a customary ordinary infringer of the law, who converted his home in a fountain of transgressions and invited the public to enter and participate of his illegal activities.

It is worth to quote here from the case of *State v. Smith*, 87 SE 2d 593 (1955). The facts of the case present a resemblance to those considered herein. "An undercover agent visited defendant's home on two occasions. He was

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[2] Section 10 of article II of the Constitution of the Commonwealth of Puerto Rico, in its pertinent part reads as follows:

> "No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized."

Since this section of the Constitution of the Commonwealth of Puerto Rico is substantially identical to the Fourth Amendment of the Constitution of the United States, we submit that it is not necessary to consider whether the latter is applicable to Puerto Rico.

We wish to state that on two occasions the transaction of sale took place outside defendant's residence. It is clear that as to these informations, the allegations that there was an illegal search does not lie. *People v. Lopez*, 77 PRR 500 (1954); BA 33;

admitted after having knocked on the door. He asked for a drink of whiskey and defendant sold the drink without questions." (R.A. 40). It was decided that:

> "Was the evidence in this case so tainted by an illegal search as to make it inadmissable? Under C S secs. 15-27, evidence obtained by an illegal search warrant is inadmissible. But here the officer knocked and was admitted. He entered into the dwelling house neither to search nor to arrest. He went to buy whiskey which the defendant readily sold him. That he testified afterwards as to what he saw and what he bought does not make his entry unlawful. A peaceful entry by invitation does not become unlawful solely by reason of his telling the court and jury about it later. Mr. Smith of course, did not volunteer the information that he was an officer.
>
> But the defendant at no time made inquiry. All the witness did was to buy whiskey and drink it the defendant did the rest."

We claim that the fact that the special agent consummated seventeen purchases of bolita numbers in defendant's house showed that he was an invitee. *Padilla* v. *State*, 273 S.W. 2d 889 (Tex. 1954); *United States* v. *Smith*, 43 F 2d 173 (1930); *Brown* v. *State*, 18 S.W. 2d (1929).

Petitioner can not complain of the unusual fact that his invitee, an assiduous "victim" of his clandestine and illegal activities, resulted to be an undercover agent with a special service assigned. It is obvious that petitioner, subjectively mistakenly took his apparent "victim" to safely commit crime.

We submit that artifice and strategems may be employed to catch those engaged in criminal enterprises. *Sorrells* v. *United States*, 287 U. S. 435, 77 L. Ed. 413 (1932); *Trout*

v. *United States*, 284 F. 2d 268; *Collins* v. *United States*, 276 F 2d 941.

In the case of *Olmstead* v. *United States*, 277 U. S. 438, 72 L. Ed. 944 (1927) the Supreme Court of the United States declared:

> "Our general experience shows that much evidence has always been received although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecution of unlicensed conspiracies for murder, robbery, and other crimes where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the profession of crime for the purpose of securing evidence. Evidence secured by such means has always been received."

To the same effect see also: *Blanchard* v. *United States*, 40 F. 2d 904 (1930) certiorari denied in 282 U. S. 865; *United States* v. *Weiner*, 49 F. 2d 789 (1931).

Heretofore our discussion started from the premise that a search and seizure was carried out by government agent. This has been done only for the sake of the argument. But we submit that no search or seizure was involved in the instant case. It is uncontradicted that no evidence was seized from petitioner. It is also undisputed, or at least it appears clearly from the only evidence in this case, that agent Calero did not carry out any search in appellant's residence or in petitioner's person, nor he Agent Calero secretly observed anything aside from what he saw in hands of petitioner. This happened while petitioner was engaged in the illegal activities of selling bolita numbers to agent Calero. It is hard to conceive how under the concurring circumstances and facts of this case, peti-

tioner's right to be protected from unreasonable searches and seizures, guaranteed by the United States and Puerto Rican Constitutions, could be invoked in the courts below or before this Hon. Court.

All the cases cited by petitioner in his discussion of this question are either wholly inapplicable or clearly distinguishable from the instant case, and, in any event, we wish to indicate that the test of reasonableness of searches and seizures under the Fourth Amendment can not be stated in rigids or absolute terms, but each case must be decided on its own peculiar facts and concurring circumstances.[3] *Gio-Bart Importing Co. v. United States*, 282 U. S. 344, 357 (1931); *Harris v. United States*, 331 U. S. 145 (1947).

In relation with appellant's attacks to the procedure followed by the law enforcement officials in the present case, we are going to quote from the case of *Harris v. United States, supra*, where the Supreme Court of the United States expressed:

> "The dangers of fundamental personal rights and interests resulting from excess of law enforcement officials committed during the course of criminal investigations are not illusory. This court has been always alert to protect against such abuse. *But we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable.* We conclude that in this case the evidence which formed the basis of petitioner's conviction was obtained without violation of petitioner's right under the constitution." (Italic ours)

[3] In any event, the government proved, prima facie, that no search and seizure was carried out in the instant case, and that, if such search and seizure was carried out, it was consented by petitioner.

Second Question Presented

In the instant case, Hector M. Calero, an undercover agent entrusted with a confidential mission, bought from defendant "bolita" numbers to be used in the illegal game of "bolita" Defendant entered said number in a piece of wrapping paper where he had entered other three digit numbers followed by a dash and other numbers to the right, all of said numbers being used in the illegal game of bolita. Defendant did not deliver any numbered tickets to agent Calero, for which reason no physical evidence was presented in evidence in this case. Agent Calero had received instructions not to arrest any person involved in any violation of the law committed in his presence, since the obvious purpose of his confidential mission was to obtain evidence against the greatest number of persons possible. It is also obvious that the postponement of detentions and arrests was imperative, or, otherwise, the large scale investigation on clandestine activities would have been impaired.

We do not deny that the government agent did not arrest defendant at the time of the commission of the offense, notwithstanding the fact that the violations were committed in the presence of said agent.

Before the trial court petitioner filed a motion to dismiss the informations based on the following grounds:

> "That the information should be dismissed because otherwise the defendant would be deprived of his constitutional right to a speedy trial, since the term provided by subdivision 1 of section 448 of the Code of Criminal Procedure of Puerto Rico has already expired counted from the time the defendant, according to the allegation was held to answer until the filing of the information, in the light of the provisions of

section 4 of Act No. 220 of 1948 which require the immediate arrest of the offenders; it being improper to leave the constitutional right of the defendant to the caprice, whim, design or convenience of the officers of The People who acted in disobedience and contempt of the mandate of said Act." (R. A. page 4)

Section 4 of Act 220 of May 15, 1948, in its pertinent part provides:

"Any person caught carrying or transporting or who has in his possession for any reason any papeleta, billete, ticket, notebook, list of numbers or letters, slips, or implements which can be used for the unlawful games of bolita, bolipool, combinations connected with the pools or bancas of the race tracks of Puerto Rico, and clandestine lotteries, and any person who possesses, sells, or in any way transports these or any other similar ones which may be utilized or used in said unlawful games or connected with the practice thereof, shall be guilty of a public offense and shall be immediately arrested and the case shall be brought without delay before the prosecuting attorney having jurisdiction on the matter, who shall file the proper information."

Section 448 of the Code of Criminal Procedure (34 L.P.R.A. sec. 1631), subdivision 1, reads as follows:

"Section 448 provides: 'The court, unless good cause to the contrary is shown shall order the prosecution to be dismissed in the following cases:

'1. Where a person has been held to answer for a public offense, if an information is not filed against him within sixty days thereafter;' ".

On appeal, the Supreme Court of Puerto Rico decided that, "The second ground adduced was decided against appellant in *People v. Superior Court*, 81 D.P.R. 445, 449 (1959), where we clearly said, after making a careful study on the matter, that the 'starting point for the sixty day term (it refers to section 448 of the Code of Criminal Procedure) must be the act of the third person, prior to the filing of the information, known to the person concerned, and which must have the legal effect of compelling that person to answer for a public offense'. Again we ratify that the sixty-day period begins to run from the date of the arrest or detention of the person for the commission of a public offense and not from the date of the occurrence of the offense." (R.A. 36)

The Court also stated that "This situation is not altered by the provisions contained in sec. 4 of Act No. 220 of 1948 supra, to the effect that 'any person who . . . sells (list of numbers or letters, slips, or implements which can be used for the unlawful games of bolita) . . . shall be guilty of a public offense and shall be immediately arrested and the case shall be brought without delay before the prosecuting attorney having jurisdiction on the matter, who shall file the proper information . . .' The doctrine that the defendant seeks to establish on the basis of the language cited from the statute has rather a grammatical than a legal force."

We submit that the ruling of the Supreme Court of Puerto Rico involves exclusively the interpretation of a local statute and that petitioner has not shown that the holding of the court below is patently erroneous or inescapably wrong.

"Immediately" is a term of relative significance. It never attempts to determine an exact period of time, and is generally used with more or less latitude, depending upon the particular subject in question. When an act is

required to be performed immediately, it implies a reasonable time, and taking consideration of all the peculiar circumstances of each case. It has also been construed as to mean that the act is to be performed as spon as possible, or within a reasonable time. Of course, what is a reasonable time must be determined from the facts of the particular case. The significance of this word depends largely on the context of the statute, and in legal proceedings, it does not purport to exclude any specific period of time. It it not necessarily construed to mean, either, that it is the equivalent of "instantaneous". See *Words and Phrases*, Vol 20, pages 150-183, *Balantine Law Dictionary with Pronunciations*, 1948 ed. page 608. See also the case of *United States* v. *Bell*, 48 F. Supp. 986 (Cited by Petitioner).

The word "immediately" as used in section 4 of Act 220 of May 15, 1948, is not to be given a restrictive or mandatory meaning. Nor should it be accorded the strict and literal construction that petitioner proposes. It would be absurd to attribute to the legislature the purpose of inoculating the law with the germ that would bring its destruction.

It must be remembered that, "the undercover man is a necessary weapon for investigating certain offenses which because of their essential clandestine character would remain unpunished if said method were not used." (R.A. 41). It is utterly clear that an immediate arrest in the instant case could have frustrated the large scale investigation in which clandestine atcivities concerning the illegal game of "Bolita" were involved.

The Supreme Court of Puerto Rico has taken judicial notice that the operation of Bolita game in Puerto Rico is a serious evil, a game in which racketeers prey on our poor classes and that "Act No. 220 represents a laudable attempt to deal effectively with these illicit activities." *People v. Mantilla*, 71 P.R.R. 35 (1950). To the same effect

see *Romero* v. *People of Puerto Rico*, 182 F. 2d 864 (1950) where the Hon. Court of Appeals for the First Circuit stated: "Section 4 of the Bolita Act is one section of number of related provisions dealing comprehensively with a long-recognized evil in Puerto Rico.".

So far as the constitutional question raised by petitioner is concerned, we contend that they are devoid of merits. Petitioner alleges that he was deprived of his constitutional right to a speedy trial.

The Supreme Court of Puerto Rico has decided in the case of *People* v. *Superior Court*, 81 P.R.R. 445, 58 (1959) that:

> "In the states of the Union it is absolutely required that the person be 'held to answer' or committed by order of a magistrate so that the term fixed by law for filing the information be put into effect. The American Law Institute, Code of Criminal Procedure (1930) pp. 311-16, 888-90; Annotation, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 847-850 (1957). After an exhaustive research we have been unable to find a single constitutional or statutory provision or a single judicial interpretation requiring the limitation period to start before one of those official actions has taken place. *On the contrary, the accepted rule is that 'in no event will the right to speedy trial arise before there is some charge or arrest, even though the prosecuting authorities had knowledge of the offense long before this.'* The Right to a Speedy Criminal Trial, supra, p. 848; Annotation; Justice Overdue, Speedy Trial for the Potential Defendant, 5 Stan. L. Rev. 95, 99-100 (1952); People v. Jordan, 290 P. 2d 484, 491 (Cal. 1955); People v. Hildebrandt, 129 N.Y.S. 2d 48, 50 (1954) revoked for other reasons in 126 N.E.

2d 377 (C.A.N.Y., 1955); cf. Taylor v. United States, 238 F.2d 259, 262 (D.C. Cir. 1956). The Code of Criminal Procedure of the American Law Institute which undoubtedly sums up the best American experience recommends in sec. 292 that the time be computed when a person is 'committed to custody'." (Italic ours)

It should be observed that petitioner was not "held to answer" until the moment in which he was arrested or detained in connection with the commission of the offense charged, and that it is clear that the informations were filed within the period of 60 days prescribed by article 448 of the Code of Criminal Procedure. There is no room for doubt either that the informations were filed within the period prescribed by the statute of limitations for misdemeanors. See 33 L.P.R.A. sec. 253.[4]

With reference to this matter the above quoted case of *People v. Superior Court*, says at page 459:

> "The foregoing proves that the letter and history of the precept, the unanimous and consistent view of this Court, and the uniform experience of the states of the Union are in open contradiction with the interpretation proposed by the defendant. There are other cogent reasons which convince us that that interpretation must be overruled. It would tend, in situations similar to this one, to cause a regrettable confusion between the 60-day limitation period of sec. 448 and the statute of limitations for crimes established by other sections of the Code. 33 L.P.R.A. secs. 231-34. Taylor v. United States, supra at 262."

[4] It is particularly interesting to note that this statutory provisions are legislative concretions of the constitutional rights to a speedy trial and that similar statutes have been enacted in a great number of states to serve identical purposes.

Petitioner's contention is weakened if we consider the basic purpose of the right to a speedy trial in criminal cases. Again we rather quote from the case of *People v. Superior Court*, supra, page 460:

> "On the other hand it should be observed that the advantage of the citizen would be, with only one exception, remote and speculative. The constitutional right to a speedy trial and the legislative corrections of it, like our aforementioned Sec. 448, have three basic purposes: to avoid long imprisonment while the trial is pending; to eliminate personal anxiety, public suspicion and the economic and moral harm produced by a criminal accusation kept unsettled for a long period of time; to initiate the trials while the evidence is disposable, in other words, to avoid, due to the delay, the loss of witnesses and the dulling of their memory. People v. Prosser, 130 N.E. 2d 893 (N.Y. 1955); Ex Parte Trull, 298 Pac. 775, 777 (Kan. 1931); United States v. Hemming, 15 F.2d 760 (9th Cir., 1926). It is obvious that the first two propositions have no bearing on the circumstances of this case nor do they support intervenor's motion. *Nor should we presume that the fact that a peace officer fails to arrest a person while committing an offense in his presence necessarily damages defendant's defense.*

It seems unnecessary to say that nothing in this opinion should be interpreted in the sense that we are trying to bar a judicial remedy for a really extraordinary situation in which it is proved that deliberately and inexcusably or as a result of serious neglect, and after proof of all the elements of the crime has been obtained, the arrest of a person or the filing of an information against him has been postponed for the purpose of obstructing the defense, or

> of creating a climate of antagonistic public opinion against defendant, or of disturbing his peace by means of continuous persecution or ignominious investigation, all in violation of his right to a speedy, fair and just trial. Undoubtedly, such an extraordinary case in the judicial system of Puerto Rico, given the recognized probity of our officials, must require further analysis of our consitiutional and statutory provisions. (Cases omitted) The existence of that possibility, rather logical than practical, cannot, however, impel us to set aside a rule that has governed our proceedings for almost six decades and which has succeeded in keeping in this area the difficult but indispensable balance between the interest to protect public security and that of safeguarding individual liberty." (Italic ours)

Petitioner has not attempted to show that failure to immediately file the information deprived him from presenting witnesses in his defense, or that it was done as a part or deliberate plan to obtain the imposition of sentences to be served consecutively instead of concurrently, since "from the point of view of the sentence imposed, it did not cause him any unreasonable prejudice since the sentences are to be served concurrently." (R.A. page 37)

"Moreover, it cannot be said that the term elapsed between the date of the first violation—May 18, 1959—and the filing of the information—December 18, 1959—has placed the appellant in an indefensible position or that it disturbed his peace by means of continuous persecution or ignominious investigation." (R.A. page 37)

It must be observed that petitioner relies exclusively on conjectures and speculations to support his contention. The grounds adduced by him to seek the reversal of the Supreme Court holding in this matter, lies mainly in two

circumstances, to wit: First, that he was not arrested immediately after the commission of the offense charged. Second, that some time had elapsed from the commission of the offense to the filing of the informations. It has been already demonstrated that these two factors are insufficient, without more, to vulnerate petitioner's right to a speedy trial.

Petitioner urges that Penal Laws must be construed strictly. But he seems to forget that: "The rule often announced, that criminal statutes must be strictly construed does not require that the words of an enactment be given their narrowest meaning or that the lawmaker's evident intent be disregarded." *United States* v. *Gilks*, 300 U.S. 41, 48; *Singer* v. *United States*, 323 U.S. 338, 341-2; *People* v. *Mantilla*, 71 P.R.R. 35 (1950). "Whether a particular trial is speedy enough depends, of course, upon all the circumstances. Nor is speed an end in itself since justice both to the accused and to the public is the prime consideration."

Third Question Presented

We pass now to consider whether the testimony of the government witness Agent Calero constitutes primary or secondary evidence and whether assuming it to be secondary if it was admissible under the specific concurring circumstances of the instant case.

Petitioner contends that the Supreme Court of Puerto Rico erred in holding that the trial court was correct in admitting the testimony of policeman Calero to prove that the accused had in his possession or control papers or lists with numbers used in connection with the illegal game of "bolita", because same constituted secondary evidence. He insists that the best evidence were the lists or tickets

themselves and they should have been produced and offered in evidence.

But it was clearly shown by the testimony of said agent Calero that the lists or slips of papers in question were not in the possession of the prosecuting attorney because the police did not attempt to occupy same in order to avoid frustrating large scale investigation there in effect and in which special secret agents were engaged.[5]

It is evident that the trial court applied the rule expounded in Wharton's Criminal Evidence, Vol 2, sec. 594 p. 481:

> "Documents in possession of adverse party. Since the defendant in a criminal case cannot be made to give incriminating evidence against himself, and is not obliged to respond to a notice to produce an incriminatory document, shown prima facie to be in his posses-

[5] At pages 22 and 23 of the Record Appendix appear the following remarks by the trial court

> "Hon. Judge: The defense only omits the ground the Court has for not applying the rule.
>
> Mr. Galib: Well, Your Honor knows that the defendant has the constitutional right of not incriminating himself. Therefore, he could not be forced to deliver the lists.
>
> Hon. Judge: No, no. As to the rule of negligence invoked.
>
> Mr. Galib: The aggravating circumstance is that the undercover man did not make an immediate arrest because then, as he alleges, the agreed plan would be destroyed.
>
> Hon. Judge: That is why he could not be arrested immediately, so that the scheme planned could be pursued, in order to discover the greatest possible number of offenders, and the evidence, the lists, could not be seized. The defense shall remember that that was the reason.
>
> Mr. Galib: Yes, Your Honor.
>
> Hon. Judge: And that did not imply negligence nor any deliberate intention to prejudice the interests of the defendant in each case, but rather to carry out, to execute, the only effective plan or effective means, in order to be able to fight the Bolita in Puerto Rico, particularly in this district."

> sion, it is generally held that secondary evidence of the document is admissible without a notice to produce the original. In fact, it has even been held that under some circumstances it is prejudicial error to demand the production of such a document from the defendant in the presence of the jury."

In reaching the same result the Supreme Court of Puerto Rico expressed that:

> "Even if the rule of best evidence were applicable, the prosecuting attorney would have been justified in using the sworn statement of the officer, since the defendant could not have been compelled to deliver any incriminatory evidence in his possession. *Heartsill v. State*, 341 P. 2d 625 (Okla. 1959); *Commonwealth v. Montanero*, 96 A. 2d 178 (Pa. 1953); *Admissibility of Secondary Evidence of Incriminatory Document in Possession of Defendant*, 67 A.L.R. 77 (1930)."

See also *Lisansky v. United States*, 31 F.2d 846 (1929); *People v. Chapman*, 203 P. 126 (1921); *People v. Powell*, 236 P. 311. (R.A. page 42).

It is obvious that any attempt of the prosecuting attorney to compel appellant to produce said list and tickets would have consituted a violation of the constitutional rights of the accused against self-incrimination.

We submit further, that in spite of the fact that the above referred evidence was clearly admissible even if it were secondary, petitioners contentions must also fail because said evidence does constitute primary evidence.

What the prosecution attempted to prove was the existence and the nature of the lists or slips of paper and their characteristics—in possession of petitioner at the time of the alleged offense, and not the specific contents of the

same. Such fact may be established, like any other fact, by the testimony of only one credible witness, who has personally seen and observed the thing about which he testifies.[6]

This is specially true if the witness possesses special qualifications, through training and experience, to accurately judge and describe the thing or object in question.

This applicable doctrine appears in Wharton's Supra, sec. 607, page 501:

> "Parol evidence equally primary with writing When the fact as to which evidence is sought to be adduced is one that may have been observed by a witness, then his testimony regarding what he has seen or heard is primary evidence, regardless of whether such fact is reduced to writing and incorporated in a record or document because the witness testifies, not as to what the writing contains, but as to what he observed."

Respecting this, the court below decided that "In order to prove the offense, the prosecuting attorney need only establish that a sale was made and for this the sworn statement of the officer is sufficient. On the other hand, the latter's testimony is not directed to prove the specific contents of the list or tickets, but merely that the transaction involved a list or ticket of those generally used in the bolita game." (R.A.-41)

A fair reading of section 4 is sufficient to fade away any doubt about what acts are prohibited, and what offenses are established therein. It is unquestionable that the provisions of said section punish the sale of bolita tickets

[6] 32 L.P.R.A. sec. 1661
"Sufficiency of direct evidence of one witness."
"The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason. Code Civil Proc., 1933, sec. 380, 32 L.P.R.A., sec. 1661."

and numbers. As may be seen, section 4 establishes several modalities of violations thereto. The government witness testified that "I brought from Mr. Sola tickets No. 935 for the amount of $1.00 for the illegal game of bolita." (R.A. 2)

Undoubtedly, this means that petitioner sold number 935 to agent Calero. Agent Calero was both a witness and a party to this transaction, and it cannot be seriously argued that his testimony about same constitute secondary evidence.

The case of *Marcus v. Search Warrant*, 367 U.S. 717 cited by petitioner is wholly inapplicable. There is a sensible distinction between giving discretion to law enforcement officials to seize allegedly obscene material, and the testimony of a police officer about what constitutes bolita tickets, or bolita "lists", as we have already seen.

Fourth Question Presented

"Whether the interpretation of Title 34 L.P.R.A., Sec. 3, by the Supreme Court of Puerto Rico with reference to the verification of informations by sworn statements is patently erroneous and contravenes the due process provision of the United States and Puerto Rican Constitutions."

Section 3 of Title 34 L.P.R.A. prescribes:

> "Every offense of which the Superior Court has original jurisdiction must be prosecuted by information filed by the prosecuting attorney, in open court, verified by his affidavit, which shall be sufficient if it states that the information is based upon the testimony of witnesses, sworn before him, or upon the testimony of witnesses taken before an examining magistrate and that he solemnly believes that there is just cause

for filing the information." Code Crim. Proc., 1935, 3; July 24, 1952, No. 11, p. 30 eff. July 25, 1952.

In the case at bar the informations were filed, subscribed and verified by district attorney Agustin Mangual Hernandez, even though they were based or supported on the testimony of witnesses examined under oath before district attorney Luis A. Limeres.

Defendant contended before the lower courts — both in the Superior Court as in the Supreme Court of Puerto Rico — that the informations should have been dismissed because they violate the afore-quoted provisions of the Code of Criminal Procedure (34 L.P.R.A. Sec. 3).

The Superior Court of Puerto Rico, Mayaguez section, overruled defendant's motion to dismiss the informations, and the Supreme Court of Puerto Rico, passing upon the question on appeal upheld the ruling of the lower court.

The court below, after making a succinct analysis of the historical backgrounds of said section 3, expressed that, "what is really of importance is that the information be supported by sworn statements, but it is not essential that the statement be sworn before the same district attorney who in turn files and swears the information" (R. 35).

The Supreme Court of Puerto Rico ruled that "Appellant's contention relies exclusively on a literal and forced interpretation of the legal text, which we feel constrained to reject because it leads to a result not intended by the legislature". (R. 35) It also decided that, "as correctly suggested by the Solicitor General in his brief filed before this court the 'prosecuting attorney' in said section refers to the generic concept of 'representative of the state' (R. 35).

In his brief petitioner challenges the holding of the Supreme Court of Puerto Rico, and to support his position alleges that "The protection afforded citizens by these

statutes (against arbitrary prosecution) is lost under the view adopted by the Supreme Court of Puerto Rico as to the requirements of the statutes. This violates fundamental principles of due process and is therefore patently erroneous."

No attempts have been made by petitioner to support his contentions either with cases or with any other authorities. We are firmly convinced that the reasoning and the holdings of the Supreme Court of Puerto Rico are fundamentally sound, and since they are self-explanatory we shall refrain from unnecessary discussions concerning them.

We submit that it is only where the issuance of a warrant of arrest is sought upon a mere information alone that there must be a strict compliance with the provisions of section 3 of the Code of Criminal Procedure of Puerto Rico. However, when the information is not intended to serve as a basis for the issuance of a warrant of arrest, but to be used only as the formal accusation of a crime, a verification is not necessary to sustain the validity of the information as such. *See People* v. *Ortiz*, 76 P.R.R. 241 (1954); *People* v. *Quiñones*, 76 P.R.R. 894 (1954); *People* v. *Superior Court*, 75 P.R.R. 501 (1953); *Lopez* v. *Superior Court*, 79 P.R.R. 470, 474-75.

It has been held that under a constitutional provision prescribing that no warrant shall issue for the arrest of an accused without probable cause supported by oath or affirmation, an information which is made to serve as the basis for the issuance of a warrant must be verified. The only purpose served by the oath, in such a case, however, is to furnish authority for the issuance of the warrant of arrest of an accused, and the oath is not necessary to sustain the information as such, since an unverified information is good for all purposes, except to be used as a basis for issuing a warrant of arrest. Such provisions do not require that an information be verified or supported by

an affidavit showing probable cause in cases where same is used simply to accuse one of a crime and is not used as the basis for the issuance of a warrant of arrest. *Albrecht* v. *United States*, 273 U.S. 1, 6-7; 71 L. ed. 505 and authorities cited therein. *Weeks* v. *United States*, 216 F. 292, certiorari denied in 235 U.S. 697.

We submit that what has been stated above is enough to dispose of the constitutional question raised by petitioner.

But we submit also that the question presented by petitioner is one involving exclusively the interpretation of a local statute.

It is well settled that although the district attorneys are no longer magistrates—after the enactment of the Constitution of the Commonwealth of Puerto Rico—and that they have been deprived of their powers to issue warrants of arrest and to fix bails, they may still subpoena witnesses, take their testimony under oath, and file informations based thereon. *People* v. *Fournier*, 77 P.R.R. 208, 240 (1954); *People* v. *Ortiz*, *supra*; *People* v. *Quinones*, *supra*; *People* v. *Superior Court*, *supra*. District attorneys still have power to determine the existence of probable cause to file informations and the determination of the existence of probable cause for such purpose is not a judicial function. See, *People* v. *Ortiz*, *supra*, page 896. It is not necessary for the district attorney, in any case, to obtain leave of court prior to filing an information.

Before the promulgation of the Constitution of the Commonwealth of Puerto Rico and according to Article 73 of the Code of Criminal Procedure of Puerto Rico, it was the law that "If the facts as stated in the information constitute an offense triable by the court, the court must direct the clerk to issue a bench warrant for the defendant". But this section has been repealed *ipso jure* by the provisions contained in the third paragraph of section 10, Article II.

of our constitution,[7] relative to the issuance of warrants for arrest. It was so decided in the case of *People v. Superior Court*, 75 P.R.R. 501 (1953).

In the aforecited case of *People v. Superior Court* it was also decided that section 74 of the Code of Criminal Procedure of Puerto Rico,[8] as amended by Act No. 22 of 1952, must be harmonized with the intent of the legislature in amending all the other sections of the Code to which reference is made therein, and which were amended to deprive prosecuting attorneys of the power, vested in them, prior to those amendments, to order the arrest of persons charged with an offense, to fix and admit bail, and to issue warrants of arrest. Thereafter, if the prosecuting attorney files an information in court, the judge is not automatically bound to direct the issuance of a bench warrant. In order to do so he must determine first, as in cases where no information has been filed, the existence of probable cause.[9]

Since, as a consequence of the approval of the Puerto Rican constitution, the district attorney cannot issue warrants of arrest anymore, neither fix and admit bail, the filing by him of an information may not be intended anymore to serve as a basis for the issuance of a warrant of

[7] Section 10 of Article II of the Constitution of the Commonwealth of Puerto Rico, in its pertinent part read as follows:

"No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized."

[8] Article 74 of the Code of Criminal Procedure of Puerto Rico provides: "The clerk shall, on the order of a judge of the court, whether the court be in session or not, issue a bench warrant under his signature and the seal of the court for the arrest of the defendant as a result of the filing of the information." 34 L.P.R.A. Section 129.

[9] All these points were discussed and considered in *Rivera Escalera v. Delgado*, 80 P.R.R. 800 (1960), affirmed by this Court in 282 F.2d 335, cert. den. 365 U.S. 883.

arrest and, therefore, any verification thereof has become substantially unnecessary, even though its requirement might have been Preserved in the Code as a formal one. Moreover, since in this jurisdiction the prosecuting attorney may determine by himself whether or not probable cause exists to file an information, and he does not have to obtain leave of court prior to filing one, its verification further becomes unnecessary and unjustifiable, making up the requirement a futile act which would serve no practical purposes. The situation would be wholly different, as shown above, where the information seeks to serve as a basis for a warrant of arrest, and in this latter case, provisions like those of section 3 of the Code of Criminal Procedure would have to be strictly complied with.

With respect to the former situation, as the Supreme Court of Puerto Rico expressed in the above cited case of *People* v. *Ortiz*, even if the information be filed on the sole determination of a prosecuting attorney, there is always the guarantee of subsequent judicial proceedings before a citizen is deprived of his liberty.

Assuming, without accepting it, and for the sake of argument only, that all informations must be verified irrespective of whether they are or not intended to serve as a basis for the issuance of a warrant of arrest, we maintain that the informations filed in the case at bar, substantially complied with the provisions of section 3 of Title 34 L.P.R.A. As we have stated before, the construction given by the Supreme Court of Puerto Rico to said statutory provisions is unquestionably sound, and since the opinion is self-explanatory, we shall not engage in unnecessary repetitions in this brief.

It is significant that petitioner does not question the sufficiency of the informations as such. It is likewise significant that there is no doubt as to the fact that the in

formations were supported by sworn statements.[1] Petitioner does not offer any valid argument to refute the Supreme Court statements as to the nature and scope and meaning of the term of "the Prosecuting Attorney", as used in said section 3. It must be recalled that it was held that the statutory name "the Prosecuting Attorney" refers to the generic concept of "representative of the state".

It is not disputed either that the informations in this case fulfill the requirements of sections 126 and 127 of Title 34 L.P.R.A. It is also patent that they are drafted in such a way that any person of ordinary intelligence may understand what they mean. They also contain all the elements of the offense sought to be charged and sufficiently informed the defendant of the nature of the charges he should be prepared to face. The alleged in connection with the offense of which he was accused were clearly and distinctly set forth in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what was intended.

Under the circumstances set forth in the preceding paragraphs, we do not believe that defendant's right were impaired or that he has suffered any harm. There has been a substantial compliance with the statutory provisions which govern the filing of informations in Puerto Rico. That is all that is required. The existence of a defect, if any, in the filing of the informations in the instant case, is merely of form, and not of substance.

We contend, also, that the motions of petitioner to dismiss the informations in the instant case were properly overruled by the courts below. The reasons therefor will be hereinafter shown.

Pursuant to the provisions of Article 145 of the Code of Criminal Procedure of Puerto Rico (34 L.P.R.A., Sec. 331)

[1] In other words, the allegation set forth in the informations were based upon facts which had been sworn to as true.

only those information charging a felony and that are not subscribed and sworn to by the prosecuting officer, must be set aside by the court, upon defendant's motion, if made at the time of the arraignment.

A mere reading of the aforementioned article of the Code of Criminal Procedure of Puerto Rico is sufficient to convince anyone that those informations charging a misdemeanor are not susceptible of being set aside upon the grounds adduced by petitioner, whether in the lower courts or before this Hon. Court.

There can be no doubt that the crime established and punished by Section 4 of Act No. 220 of 1948 (Bolita Law) is a misdemeanor. According to the provisions of said Section 4, any person convicted of a violation thereof shall be punished by imprisonment in jail for a term of not less than six months (6) or more than two (2) years (33 L.P.R.A., Section 1250).[11]

Article 14 of the Penal Code of Puerto Rico provides:

> "A felony is a crime which is punishable with death, or by imprisonment in the penitentiary. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the penitentiary is also punishable by fine or imprisonment in jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary." (33 L.P.R.A, Sec. 35).

It is obvious, from the above quoted article, that any crime which is not punishable by imprisonment in the peni-

[11] It must be observed that a felony is also established for subsequent violations of Section 4 of the "Bolita Law", but not for the first offense.

tentiary, is a misdemeanor. As we have shown before, section 4 of the "Bolita Law" establishes a punishment by imprisonment in jail for any infringement thereof. Consequently, petitioner is precluded from asking for the dismissal or for the setting aside the information in the instant case, in which a misdemeanor, and not a felony, is involved.

In conclusion, the opinion of the United States Court of Appeals for the First Circuit, deciding that the appeal from the judgment of the Supreme Court of Puerto Rico, presented no substantial question of constitutional right nor serious question of interpretation of local law, is patently correct.

Petitioner has failed to demonstrate that the opinion of the Court below is in conflict with the decision of another court of appeals, on the same matter, or has decided an important question of federal law which has not been, but should be settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this Hon. Court. There is no reason to call for an exercise of this Hon. Court powers of supervision.

Prayer

Wherefor respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

J. B. Fernandez Babilo
Counsel for Respondent
Jorge Segarra Olivero
Assistant Solicitor General

APPENDIX

CONSTITUTION OF THE UNITED STATES
FOURTH AMENDMENT

"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO
ARTICLE II, SECTION 10

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

Wire-tapping is prohibited.

No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.

Evidence obtained in violation of this section shall be inadmissible in the courts."

ACT NO. 220 OF MAY 5, 1948 SECTION 4
(33 L.P.R.A., SECTION 1250)

"Any person caught carrying or transporting or who has in his possession for any reason any *papeleta, billete, ticket*, notebook, list of numbers or letters, slips, or implements which can be used for the unlawful games of *bolita, bolipool*, combinations connected with the pools or *bancas* of the racetracks of Puerto Rico, and clandestine lotteries, and any person who possesses, sells, or in any way transports these or any other similar ones which may be utilized

or used in said unlawful games or contests with the practice thereof, shall be guilty of a public offense and shall be immediately arrested and the case shall be brought without delay before the prosecuting attorney having jurisdiction on the matter, who shall file the proper information. Such person shall, upon conviction, be punished by imprisonment in jail for a term of not less than six (6) months or more than two (2) years, and for the second and subsequent violations, shall be punished by imprisonment in the Penitentiary for not less than one (1) year nor more than ten (10) years. *Provided*, That all trials for violations of the provisions of sections 1247-1257 of this title shall be heard in the Superior Court by the court without a jury, exclusively, and the judges of the Superior Court of Puerto Rico are hereby directed to give preference to the hearing of all cases involving a violation of any of the provisions of sections 1247-1257 of this title."

CODE OF CRIMINAL PROCEDURE OF PUERTO RICO

SECTION 3

(34 L.P.R.A. 3)

"Every offense of which the Superior Court has original jurisdiction must be prosecuted by information filed by the prosecuting attorney, in open court, verified, by his affidavit, which shall be sufficient if it states that the information is based upon the testimony of witnesses sworn before him, or upon the testimony of witnesses taken before an examining magistrate, and that he solemnly believes that there is just cause for filing the information."

SECTION 78

(34 L.P.R.A. 128)

"If the facts as stated in the information constitute an offense triable by the court, the court must direct the clerk to issue a bench warrant for the defendant."

SECTION 71
(34 L.P.R.A., 126)

"The information must contain:

1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties.

2. As statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

SECTION 82
(34 L.P.R.A., 137)

"The information is sufficient if it can be understood therefrom:

1 That it is entitled in a court having authority to receive it, though the name of the court be not stated.

2. That the information be subscribed and presented to the court by the prosecuting attorney of the district in which the court is held.

3. That the defendant is named, or if his name can not be discovered, that he is described by a fictitious name, with a statement that his true name is to the prosecuting attorney unknown.

4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the court, is triable therein.

5. That the offense was committed at some time prior to the time of filing the information.

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

"7. That the act or omission charged as the offense, is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

SECTION 145
(34 L.P.R.A., 334)

"An information charging a felony, not subscribed and sworn to by the prosecuting officer, must be set aside by the court, upon the defendant's motion, made at the time he is arraigned."

SECTION 448
(34 L.P.R.A., 1631)

"The court, unless good cause to the contrary is shown, shall order the prosecution to be dismissed in the following cases:

1. Where a person has been held to answer for a public offense, if an information is not filed against him within sixty days thereafter;

2. If a defendant, whose trial has not been postponed upon his application is not brought to trial within one hundred and twenty days after the filing of the information."

CODE OF CIVIL PROCEDURE
SECTION 380
(32 L.P.R.A., 1661)

"The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

PENAL CODE OF PUERTO RICO

SECTION 79

(33 L.P.R.A., 233)

"The prosecution for any misdemeanor must be commenced within one year after its commission, except in cases of violation of the Internal-Revenue Laws, when prosecution may be commenced within three years after their commission."